IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 3367 OF 2002

IN

SUIT NO. 2586 OF 1997

Priti P. Ashar .. Plaintiffs

versus

Pankaj M. Ashar & ors. .. Defendants

...

Mr.J.S. Kini for the plaintiff.

Mr.David Joseph i/b David & Associates for the defendant no.2.

Mr.H.S.S. Murthy for the defendant no.3.

Mr.S.R. Rajguru for the respondent no.1 - Income tax.

CORAM : D.G. KARNIK,J.

DATED : 11th March 2005.

P.C.:

1. Heard the learned counsel for the parties.

2. The learned counsel for the plaintiff does not

press this motion against the respondent nos.2 and 3. The plaintiff herein is a widow of Paresh. Paresh was the brother of defendant nos.1, 2 and 3 and died in February 1993. According to the plaintiff, the suit properties originally belonged to father of Paresh and defendant nos.1, 2 and 3, who died in the year 1984. After the death of the father, properties were inherited by Paresh and defendant nos.1 to 3. The plaintiff being the widow of Paresh claims 1/4th share in the properties of the deceased father of the defendant nos.1 to 3 and Paresh.

3. In the present motion, we are concerned only with the properties bearing Gala nos.A-1, A-2, A-3 and A-4 and A-5 situated at Matru Mandir Co-operative Housing Society Limited. All the five galas are let out to the Income tax department which is represented by respondent no.1. In this motion, the plaintiff claims injunction restraining the respondent no.1 from paying the rent of the galas to the defendant nos.1 to 3 and also prays for paying to her 1/4th share in the past rent which has been deposited in the Court in pursuance of an order dated 4th November 2004.

4. As regards the gala nos.A-1, A-2 and A-3, the learned counsel for the defendant nos.2 and 3 submit that the said galas belong to Prabhudas Vanarsai & Co. and did not belong to the father of the defendant nos.1 to 3. They therefore, submit that plaintiff has no share in the said gala nos.A1 to A3 and therefore, there can be no injunction restraining the payment of rent to defendant nos.1 to 3. By filing a supplementary affidavit dated 1st December 2004 the plaintiff has produced on record a certified copy of extract of registration of the partnership firm Prabhudas & Co. Perusal of the said extract show that neither of the defendants is a partner in the said partnership firm. Therefore, assuming the contention of the defendant nos.2 and 3 to be true that the gala nos.A1 to A3 belong to Prabhudas Vanarsai & Co, the defendants obviously are not entitled to collect the rent thereof. In the circumstances, it would be appropriate to grant an injunction restraining the defendant nos.1 to 3 to collect and restraining the Respondent no.1 to pay the rent of Gala nos.A1, A2 and A3 to the defendants. respondent no.1 from paying the rent in respect of the gala nos.1, 2 and 3 to any of the defendant.

5. It is not disputed that gala nos.A-4 and A-5 belonged to the late father of the defendant nos.1 to 3 and the husband of the plaintiff. It is also not disputed that the father died in the year 1983 without leaving behind him a will. It is also submitted that the defendant nos.1 to 3 and Late Mr. Prabhudas were the only sons and heirs left behind by the father and his wife has also died. In the circumstances, each of the defendants would have 1/4th share in the property and the plaintiff would prima facie have 1/4th share in the said galas. The plaintiff would therefore, be entitled to 1/4th share in the rent of gala nos.A4 and A5. However, since the parties have not obtained succession certificate nor have proved their representative character under section 212 to 214 of the Indian Succession Act, it would not be appropriate to permit them to withdraw the entire arrears of rent deposited in the Court. However, taking into consideration the fact that plaintiff is a widow and has no other source of income, it would be appropriate to permit her to withdraw part of the amount which is deposited in the Court and also permit her to withdraw part of the future rent in respect of gala nos.A-4 and A-5.

6. I am informed at the bar that an amount of Rs.49,86,058/- has been deposited in the court by respondent no.1 towards the arrears of rent of Gala nos.A4 and A5. It is also submitted that an amount of Rs.33,030/- p.m. is payable towards the rent of gala nos.A4 and A5. Taking into consideration that plaintiff would have 1/4th share in the arrears of rent which approximately comes to Rs.12,45,000/-, it would be appropriate to permit her to withdraw approximately 50% of the amount of her share i.e. Rs.6 lakhs and also permit her to withdraw the monthly sum of Rs.5,000/- out of the future rent. As no application has been made by the defendant for withdrawal of their share no order is passed regarding their share and they are at liberty to take out separate motion, if so advised, which may be considered on the basis of their need till obtaining of the appropriate succession certificate.

7. For these reasons, motion is partly allowed in the following terms.

8. The plaintiff is permitted to withdraw a sum of Rs.6,00,000/- out of her share in Rs.49,86,058/- deposited by the respondent no.1 in the Court. The

respondent no.1 is further directed to deposit in this Court the future rent,as and when it becomes due, subject to the payment of deduction of taxes, if any, in accordance with law. Out of the future rent to be deposited in the Court by the respondent no.1, the plaintiff is permitted to withdraw the sum of Rs.5,000/- per month towards her maintenance. The amounts withdrawn by the plaintiff in pursuance of this order would be taken into consideration while compounding her share in the property/its income. The plaintiff shall be liable to pay Income tax relating to the money withdrawn by her in accordance with law. The defendant nos.1 to 3 are restrained from collecting the rent of gala nos. A-1, A-2 and A-3 and the respondent no.1 is restrained from paying it to the defendants.

9. Parties to act on authenticated copy of this order duly authenticated by the Associate.

10. At the request of the learned counsel for the defendant nos.2 and 3, operation of this order is stayed for a period of two weeks.

11. Motion disposed of in the aforesaid terms.

D.G. KARNIK, J